No. 93-1143

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IN RE: DONALD J. TRUMP CASINO SECURITIES LITIGATION-TAJ MAHAL LITIGATION.

JOANNE GOLLOMP, ET AL.,

Petitioners,

v.

DONALD J. TRUMP, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STUART J. BASKIN
STEPHEN J. MARZEN
F. RUSSELL DUPUY
SHEARMAN & STERLING
One Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 848-4000

Attorneys for Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

RICHARD L. POSEN
Counsel of Record
JOHN R. OLLER
GEORGE VUOSO
MICHAEL P. COLLINS
WILLKIE FARR & GALLAGHER
One Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 821-8000

JOHN J. BARRY
CLAPP & EISENBERG, P.C.
One Newark Center
Newark, New Jersey 07102
(201) 642-3900

Attorneys for Trump Respondents

QUESTION PRESENTED

Whether the court of appeals correctly concluded that no reasonable investor could have been misled by a single sentence in a bond offering prospectus concerning management's belief as to future events in light of the explicit and extensive warnings related directly to the challenged sentence.

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JURISDICTION

The judgment of the court of appeals was entered on October 14, 1993. The petition for a writ of certiorari was filed on January 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case concerns a prospectus for a manifestly risky but potentially highly remunerative investment opportunity in an uncompleted and unprecedented new business venture. After an exceptionally thorough examination of the entire prospectus, the court of appeals rightly concluded, as did the district court, that because of the abundant warnings and cautionary statements in the prospectus bearing specifically on the single statement of management belief challenged by Petitioners, no reasonable investor could have been misled by that statement.

Far from establishing a new "*per se* rule," as Petitioners contend, the court of appeals' decision was based on a highly fact- and context-specific application of the traditional test for materiality under the federal securities laws. As the court put it, the "bespeaks caution" doctrine that it applied in affirming the dismissal of Petitioners' claims represents "new nomenclature rather than substantive change in the law," and is "essentially shorthand for the well-established principle that a statement or omission must be considered in context, so that accompanying statements may render it immaterial as a matter of law." Pet. App. A9. The court did not hold that cautionary

language always suffices to obviate the materiality of alleged misrepresentations or omissions, but neither did it accept Petitioners' broad and unsupported assertion that the statement at issue here is always material, regardless of context or circumstance.

In rejecting Petitioners' own *per se* rule, the court of appeals' decision is consistent with the decisions of this Court and other courts of appeals holding that materiality depends on the context and total mix of disclosures, and that publishing accurate facts in a prospectus or proxy statement can render an allegedly misleading statement "too unimportant to ground liability." *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2760 (1991). And contrary to Petitioners' assertion, the court of appeals' analysis in no way conflicts with the practices and regulations of the Securities and Exchange Commission ("SEC") regarding forward-looking statements. The regulations Petitioners cite do not purport to address the question addressed below — namely, whether a statement should be read in the context of the many warnings that explain and qualify it.

A. The Prospectus and Its Extensive Warnings

Petitioners "ground their lawsuits in the text of the prospectus" that was issued in 1988 to finance the acquisition and completion of the Taj Mahal, a lavish casino/hotel in Atlantic City, New Jersey. Pet. App. A13. When ultimately opened in April 1990, the Taj Mahal was at least twice the size of any other casino in Atlantic City. Pet. App. A12. This massive, unique project was subject to considerable and obvious risks, as reflected in the investors' rate of return. The bonds issued pursuant to the prospectus carried an interest rate of fourteen percent, high in comparison to the nine percent yield offered on quality corporate bonds at the time.

The prospectus likewise reflected the extremely risky nature of the investment, containing pages of detailed warnings in prominent type, in plain language, in conspicuous locations, and with numerous cross-references. These warnings begin on the cover page and in bold print: **"See 'Special Considerations' for a discussion of certain factors to be considered by potential investors."** Pet. App. A78. Three pages later is a synopsis of the "Special Considerations" section containing warnings about the Partnership's ability to meet its debt service, followed by the actual Special Considerations section, which begins with the following italicized warning:

> *Before making a decision to purchase any of the Bonds, prospective purchasers should consider carefully the following factors, among others set forth in this Prospectus, which could materially adversely affect (i) the operations of the Partnership and its ability to make necessary payments to the Company to meet the debt service requirements of the Bonds and (ii) the security for the Bonds.*

Pet. App. A79-80. More than nine pages of specific warnings follow this notice, including a subsection directly addressed to the "Ability of the Partnership to Service Debt." That subsection cautioned investors that, among other things:

- The Taj Mahal had not been completed and, accordingly, had no operating or earnings history;

- The Taj Mahal would be subject to all of the risks inherent in the establishment of a new enterprise, and the ability of the Partnership to service its debt was completely dependent on the success of that new enterprise and a host of financial, business,

competitive, regulatory, and other factors affecting the Taj Mahal and the casino industry in general;

- The Taj Mahal would be approximately twice the size of other casino/hotels in Atlantic City, and no Atlantic City casino/hotel operator had experience operating a complex of that size;

- No assurance could be given that, once opened, the Taj Mahal would be profitable or that it would generate cash flow sufficient to provide for the payment of the debt service;

- The Taj Mahal Partnership would not have the benefit of peak summer season cash flow prior to the third interest payment on the bonds, which would adversely affect its ability to pay interest on the bonds.

Pet. App. A36-38.

In the "Security for the Bonds" subsection of the Special Considerations section, the prospectus went on to explain that if a default occurred prior to completion of the Taj Mahal, "there would not be sufficient proceeds [from a foreclosure sale . . . to pay the principal of, and accrued interest on, the Bonds." Pet. App. A38. A subsection on "Competition" further disclosed that competition in the Atlantic City casino/hotel market was "intense;" that casino "win per square foot" was projected to decline in 1990; and that growth in Atlantic City "win" was expected to be restrained until further improvements in the city's transportation system and infrastructure were undertaken and completed. Pet. App. A39. Similar conspicuous warnings, on every pertinent risk factor, pervade the remainder of the document. Pet. App. A36-40.

As noted by both courts below, Petitioners' claims focus on a lone sentence contained in the middle of the prospectus, twenty pages after the subsection detailing the risks that the debt could not be repaid. The challenged statement read: "The Partnership believes that funds generated from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal)." Pet. App. A13-14. This statement, implicit in the offering itself, merely stated the obvious — i.e., that the Partnership considered the Taj Mahal a feasible, rather than futile, undertaking.[1] In attempting to use this sentence to state a claim, Petitioners have lifted it out of context and ignored the directly relevant warnings and risk factors that appear throughout the document, not to mention the very next sentence, which states: "No assurance can be given, however, that actual operating results will meet the Partnership's expectations." Following this sentence, the reader is then immediately directed, by cross-reference, to the "Special Considerations" subsection regarding "Ability of the Partnership to Service Debt," with its many warnings cited above. Pet. App. A116.

As these cautionary statements make clear, the Taj Mahal prospectus repeatedly disclosed the relevant risks and exhibited candor far beyond that required by federal securities law. In the words of the district court, the prospectus "fairly screams

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1 As evidence of its belief in the project, the issuer contributed $75 million of equity capital that was subordinated to the bonds. Pet. App. A137. If the bonds were not repaid, the issuer stood to lose its entire $75 million contribution, as well as its management fee. To presume that the issuer did not believe that it could service the debt is to presume, implausibly, that it was willingly throwing away its own $75 million investment and committing itself to operate the casino for free.

caution." Pet. App. A123. And as the court of appeals observed, in light of these disclosures and the inherently uncertain nature of the project, the solitary sentence at issue "was, at worst, harmless." Pet. App. A42.

B. The District Court Proceedings

The district court dismissed Petitioners' claims in an exhaustive opinion that scrutinized the prospectus as well as the allegations in Petitioners' Consolidated Amended Complaint ("amended complaint"). As the district court found, the prospectus "virtually bristle[s] with warnings as to the extremely risky nature of the investment." Pet. App. A121 (internal quotation marks omitted). The district court rejected Petitioners' attempt to dismiss the cautionary warnings as mere "boilerplate," and instead emphasized that the warnings were "specifically tailored" to each challenged statement. As the court concluded, "the text of the prospectus itself shields defendants from liability, for it is a carefully crafted, fully disclosing document." Pet. App. A124.

After carefully examining the amended complaint, the district court concluded that Petitioners had sought to "distort the plain meaning of the prospectus in order to state a claim," and had relied on "isolated statements buried in the midst of the document while overlooking prominent, conspicuous warnings at the beginning of the document as well as immediately surrounding the challenged statements." Pet. App. A182-83. In particular, the district court found that in seizing upon the lone statement of belief about the issuer's ability to service the debt, Petitioners had "utterly disregarded the entire 'Special Considerations' section of the prospectus," as well as the "no assurance" language immediately following the challenged statement. Pet. App. A122. Read in context, the court

concluded, the "ability to service debt" prediction could not form the basis for a claim of fraud.

The district court also rejected Petitioners' sundry other claims of alleged misrepresentations and omissions, repeatedly finding that the prospectus "states the very fact which plaintiffs contend has been omitted," or that the alleged nondisclosure was clearly immaterial in light of other disclosures in the prospectus. Pet. App. A148, A150, A151, A166. Indeed, the district court termed Petitioners' claims variously as "spurious," "patently false," and "beyond this court's ken." Pet. App. A133, A137, A165. Concluding that "these very defects represent the essence of plaintiffs' complaint," and hence were not amenable to correction by amendment, the district court dismissed the amended complaint with prejudice. Pet. App. A183.[2]

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2 The district court also held that materials outside the pleadings were not to be considered on a motion to dismiss, including the so-called "Laventhol Report" issued by the (now-defunct) accounting firm of Laventhol & Horwath for a different company, Resorts International, Inc. ("Resorts"), the original developer of the Taj Mahal project. Pet. App. A171-72. The district court observed that Petitioners had "not complied with our local rules concerning motions for leave to amend a complaint" and at oral argument "effectively withdrew any request for amendment." Pet. App. A172 n.12, A173 n.13. Nevertheless, the district court proceeded to consider the substance of the Laventhol Report in order to determine whether amendment would be futile, ultimately concluding that the document was "insufficient to support a securities fraud claim" because the issuer had no duty to include a third party's papers in its offering document, and the Laventhol Report was immaterial in any event. Pet. App. A177-79.

C. The Court of Appeals Decision

The court of appeals affirmed the district court's dismissal of the amended complaint, again based on the "abundance of warnings and cautionary language which bore directly on the prospective financial success of the Taj Mahal and on the Partnership's ability to repay the bonds." Pet. App. A35. In light of this "extensive yet specific cautionary language," which was "tailored precisely to address the uncertainty concerning the Partnership's prospective ability to repay the bondholders," the court of appeals held that no reasonable investor would have found the lone challenged statement of management belief material to his or her decision to invest in the Taj Mahal. Pet. App. A35, A46.

As did the district court, the court of appeals rejected any notion that the cautionary language was mere "boilerplate," observing that the issuer "did not bury the warnings about risks amidst the bulk of the prospectus. Indeed, it was the allegedly misleading statement which was buried amidst the cautionary language." Pet. App. A40. As the court stated:

> [W]e must consider an alleged misrepresentation within the context in which the speaker communicated it. Here the context clearly and precisely relayed to the bondholders the substantial uncertainties inherent in the completion and operation of the Taj Mahal. The prospectus contained both general warnings that the Partnership could not assure the repayment of the bonds as well as specific discussions detailing a variety of risk factors that rendered the completion and profitable operation of the Taj Mahal highly uncertain. Within this broad context the statement at issue was, at worst, harmless. Pet. App. A41-42.

The court of appeals also considered, and rejected, each of Petitioners' allegations that the prospectus had omitted various material facts, including allegations relating to Donald Trump's personal finances, the required "average daily casino win" to repay the bonds, the debt-equity ratio of the Taj Mahal project, and the alleged difficulties the Taj Mahal would have in attracting customers from other casinos. Pet. App. A58-72.[3] Having had these allegations again rejected as a matter of law, Petitioners have elected not to press them in seeking review by this Court.

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3 The court of appeals refused to consider the Laventhol Report. The court pointed out that Petitioners "did not raise the denial of their motion to amend [based on the Laventhol Report] in their statement of the issues." Pet. App. A22 n.7. "Moreover, [Petitioners] expressly stated in their opening brief that they did not wish to challenge this portion of the district court's order . . . ." Pet. App. A23 n.7. Although Petitioners raised the Laventhol Report in their reply brief in the court of appeals, that court refused to "reach the merits of this issue" because "the courts of appeals will not consider arguments raised on appeal for the first time in a reply brief." *Id.* (internal quotation marks omitted).

ARGUMENT

I.

THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS CONCERNING THE MATERIALITY OF STATEMENTS IN A PROSPECTUS OR SIMILAR PUBLIC DOCUMENT.

In rejecting the claimed materiality of the alleged misstatements and omissions in the Taj Mahal prospectus, the court of appeals explained that materiality "depends on the specific text of the offering document or other communication at issue, i.e., courts must assess the communication on a case-by-case basis." Pet. App. A43-44. The Third Circuit's approach is thus fully consistent with the long-established test of materiality under the decisions of this Court and other courts of appeals, by which an alleged misrepresentation or omission in a public document must be considered in context and can be rendered immaterial by other information in the document.

This Court's seminal decision in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), teaches that in deciding whether a statement is actionable, the "'total mix' of information made available" to investors must be considered, and that an omission may be immaterial as a matter of law if it is so obviously unimportant to an investor that "'reasonable minds cannot differ on the question of materiality.'" *See id.* at 449-50 (internal quotation marks omitted). And in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), which applied the *TSC Industries* test to SEC Rule 10b-5, the Court reiterated that an allegedly false or incomplete statement is not actionable if it is

"otherwise insignificant." *Id.* at 238. As the Court stated, "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Id.* at 240.

Both *TSC Industries* and *Basic Inc. v. Levinson* involved the materiality of undisclosed existing facts surrounding proposed corporate acquisitions, not statements of opinion by management. In *Virginia Bankshares*, this Court held explicitly for the first time that statements of reasons, opinions, or belief by corporate managers may be actionable under the securities laws if those beliefs are not genuinely held. But consistent with *TSC Industries*, the Court made it clear that otherwise actionable misstatements may not support liability if accompanied by sufficient objectively true statements:

> While a misleading statement will not always lose its deceptive edge simply by joinder with others that are true, the true statements may discredit the other one so obviously that the risk of real deception drops to nil. Since liability under § 14(a) must rest not only on deceptiveness but materiality as well (i.e., it has to be significant enough to be important to a reasonable investor deciding how to vote), petitioners are on perfectly firm ground insofar as they argue that publishing accurate facts in a proxy statement can render a misleading proposition too unimportant to ground liability.

111 S. Ct. at 2760 (citing *TSC Industries*, 426 U.S. at 449). The Court went on to conclude that on the particular facts before it, the disclosures by the defendant bank did not render the alleged misstatements nonactionable because the explanatory

disclosures were themselves "half truth[s] . . . [or] arguably even worse." *Id.* at 2760-61.

The alleged misstatement at issue in *Virginia Bankshares* concerned the bank directors' opinion as to the current value of the bank's stock. If adequate explanatory statements may sometimes render expressions of management belief as to existing matters nonactionable, as *Virginia Bankshares* indicates, it follows that adequate warnings surrounding even "softer" information, such as management predictions of future events, can have the same mitigating effect. That is precisely what the court of appeals held. As the court put it:

> [W]e can state as a general matter that, when an offering document's forecasts, opinions or projections are accompanied by meaningful cautionary statements, the forward-looking statements will not form the basis for a securities fraud claim if those statements did not affect the "total mix" of information the document provided investors. In other words, cautionary language, if sufficient, renders the alleged omissions or misrepresentations immaterial as a matter of law.

Pet. App. A44.

Conversely, as the court took care to emphasize, "a vague or blanket (boilerplate) disclaimer which merely warns the reader that the investment has risks will ordinarily be inadequate to prevent misinformation. To suffice, the cautionary statements must be substantive and tailored to the specific future projections, estimates or opinions in the prospectus which the plaintiffs challenge." Pet. App. A45.

It is thus readily apparent that the court of appeals did not adopt any "*per se* rule," as Petitioners contend, nor did it relegate application of the securities laws "only to blue chip securities." Pet. 7. Instead, consistent with this Court's decisions, the court held that in some cases, including this one, warnings about "soft," forward-looking statements may be so pervasive and overwhelming as to exhaust any conceivable significance of the challenged misstatement or omission. The court's decision in no way conflicts with *Virginia Bankshares*, the reasoning of which in fact "supports rather than undermines the application of the bespeaks caution doctrine in this case," as the court of appeals found. Pet. App. A47. Indeed, Petitioners did not raise *Virginia Bankshares* as an issue before the district court.

The court of appeals' analysis is consistent not only with *Virginia Bankshares*, but also with the approach followed by each of the other courts of appeals to have addressed the materiality of forward-looking statements in similar circumstances. The First, Second, Eighth, and Ninth Circuits each have held that forward-looking statements accompanied by adequate cautionary language are not actionable as securities fraud. *See Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 (1st Cir. 1991) (prospectus that "warned potential investors in a meaningful way" about risks of investment did not give rise to securities law claim); *I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 761, 763 (2d Cir. 1991) (alleged misstatement read "together and in context" with cautionary statements in prospectus was not materially misleading because prospectus clearly bespoke caution "rather

than encouraging optimism");[4] *Moorhead v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 949 F.2d 243, 245 (8th Cir. 1991) (bond offering prospectus that allegedly misrepresented defendant's ability to service the bond debt held not actionable in light of the "repeated, specific warnings of significant risk factors and the disclosures of underlying factual assumptions"); *In re Convergent Technologies Sec. Litig.*, 948 F.2d 507, 516 (9th Cir. 1991) (securities law claims dismissed because prospectus for new, untried venture provided "more than generalized statements of risk" and contained detailed cautionary warnings). The court of appeals' dismissal of Petitioners' claims as a matter of law in this case followed the rationale of these cases. Indeed, as the district court below

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4 *See also Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986) (rejecting liability as a matter of law based on allegedly faulty projections of cash generation and tax benefits because of disclaimers in offering memorandum that projections were "necessarily speculative in nature," that "[n]o assurance [could] be given that these projections [would] be realized," and that "[a]ctual results may vary from the predictions and these variations may be material") (internal quotation marks omitted).

Petitioners wrongly contend that the Second Circuit's decision in *Brown v. E.F. Hutton Group, Inc.*, 991 F.2d 1020 (2d Cir. 1993), creates a "division" among the circuits on the conceptual basis for the "bespeaks caution" doctrine. *See* Pet. App. A31-32. Consistent with that doctrine, the court in *Brown* concluded that the numerous cautionary warnings in the prospectus provided investors with "full and objective disclosure of non-misleading factual material." 991 F.2d at 1033. In light of the non-misleading nature of the written prospectus, the court concluded that plaintiffs could not have reasonably relied on contradictory oral representations made by the defendant's brokers. The impact of a materially accurate prospectus upon an investor's reliance on extrinsic oral statements is not an issue here.

stated, this is an even easier case, because the Taj Mahal prospectus contained "even more specifically tailored disclaimers directly addressing each challenged statement," than did the offering materials in the other appellate decisions cited above. Pet. App. A126.

Petitioners erroneously contend that the decision below conflicts with that of the Sixth Circuit in *Mayer v. Mylod*, 988 F.2d 635 (6th Cir. 1993), which clarified that circuit's own prior decision in *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037 (6th Cir. 1991). In *Sinay*, which was decided without reference to *Virginia Bankshares*, the Sixth Circuit stated without qualification that "[e]conomic projections are not actionable if they bespeak caution." 948 F.2d at 1040 (citation omitted). As the court of appeals below aptly observed, the *Mayer* court "properly recognized that in light of *Virginia Bankshares* its earlier statement [in *Sinay*], which one could have read to indicate that economic projections coupled with warnings and cautionary statements are per se non-actionable, was overbroad." Pet. App. A52 n.16. Because the court of appeals stressed that it was not establishing "a sweeping rule that cautionary statements will always render misrepresentations or omissions immaterial as a matter of law," it correctly concluded that there was no conflict between its approach and that of the Sixth Circuit in *Mayer*. *Id.* Much less is there any direct, irreconcilable conflict of the sort to warrant review by this Court.[5]

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5 Contrary to Petitioners' contention, the Sixth Circuit in *Mayer* did not hold that the materiality of forward-looking statements can never be decided at the pleading stage. *Mayer* did not even consider projections or forward-looking statements and the warnings and risk factors that serve to qualify them. Rather, the statements challenged

(continued...)

II.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH SEC PRACTICE OR REGULATIONS AND IS CONSISTENT WITH THE SEC'S POLICY OF FULL DISCLOSURE.

In an argument neither pressed nor passed upon below, Petitioners assert that dismissal of their claims was precluded by Item 303 of SEC Regulation S-K, 17 C.F.R. § 229.303 (1993), "Management's Discussion and Analysis of Financial Condition and Results of Operations" ("MD&A"). Petitioners contend that the SEC requires the issuer of a high-yield bond offering prospectus to state its belief as to its ability to repay the bonds, that such a statement therefore can never be immaterial as a matter of law, and that the court of appeals' decision conflicts with SEC practice in this regard. But the conflict Petitioners posit here for the first time is entirely illusory.

Notably, Petitioners never raised in either the district court or the court of appeals the question they purport to present to this Court, namely, whether Item 303 of Regulation S-K precludes a determination that the alleged misstatement regarding debt service was immaterial as a matter of law. While Petitioners observed, in a footnote to their brief to the court of appeals, that the MD&A section is "the centerpiece of

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5 (...continued)

in *Mayer* related to the present status of the issuer's loan portfolio and its current financial position. Moreover, absent in *Mayer* was any mention of compelling cautionary language in the prospectus, such as that contained in the Taj Mahal prospectus, to counterbalance the issuer's optimistic assessment of its loan portfolio.

the [SEC's] disclosure regimen" (Appellants' Br. at 7 n.4), they never argued that a statement of management belief regarding ability to repay bonds can never be immaterial as a matter of law on the theory that the SEC requires such a statement to appear in a bond offering prospectus. Nor did the court of appeals consider or pass upon this argument. Because this argument was neither "pressed or passed upon below," it provides no basis for review by this Court. *United States v. Williams*, 112 S. Ct. 1735, 1738 (1992); *EEOC v. FLRA*, 476 U.S. 19, 24 (1986); *see also County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244-45 (1985); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[6]

In any event, Petitioners' argument based on "SEC practice" has no merit. To begin with, Petitioners cite no SEC regulation or authority for the proposition that the SEC requires the particular disclosure at issue here. But even if that proposition is accepted, there is simply no conflict between such a requirement and the decisions of the courts below. Neither the district court nor the court of appeals held that MD&A disclosures regarding liquidity or debt service, as a

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6 Petitioners also made an Item 303-based argument to the district court, different from the one they make here, which the district court rejected and which Petitioners did not raise on appeal. Petitioners claimed that the prospectus "omitted to state . . . that there existed 'known . . . uncertainties' regarding whether the operation of the Taj Mahal would generate sufficient funds to cover all of its debt service." Pet. App. A133. The district court stated that it was "beyond this court's ken how plaintiffs could support such an allegation, considering the repeated warnings in the prospectus that there most definitely were 'uncertainties' as to the ability of the Taj partnership to cover its debt service." Pet. App. A133-34. That holding was neither challenged before, nor considered by, the court of appeals.

category, are immaterial. Instead, the courts below held that in the specific context of the Taj Mahal prospectus and its numerous pointed warnings, the particular statement at issue would not have influenced a reasonable investor. Nothing in Item 303 of Regulation S-K is inconsistent with the principle that forward-looking statements should be read in context and are not actionable if surrounded by suitable warnings and discussions of risk.[7]

The most that can be said of Item 303's relevance to this case is that Respondents in fact made the disclosures that were required, with the materiality of any particular disclosure left to be determined under traditional tests. Item 303 calls for issuers of securities to inform the securities markets of information, "trends," and "uncertainties" that are useful in understanding the business' financial conditions and operations. It is precisely the discussion of such trends, uncertainties, and risks that pervaded the Taj Mahal prospectus and upon which both courts below relied in finding the prospectus unobjectionable. Nothing in any SEC practice or regulation undermines the lower courts' analysis.

Petitioners' reliance on SEC Rule 175, 17 C.F.R. § 230.175 (1993), which establishes a "safe harbor" for

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7 Indeed, the Solicitor General's *amicus curiae* brief filed on behalf of the SEC and the FDIC in *Virginia Bankshares* noted that "evaluation of the total mix [of information] may reveal that the relevant objective facts were disclosed with sufficient prominence to render a misrepresentation of reasons or purposes obviously unimportant, and, therefore, immaterial as a matter of law." Solicitor General's Br. at 12 (citing *TSC Industries*, 426 U.S. at 450).

management projections, is similarly misplaced. Rule 175 simply provides that a "forward-looking" statement is actionable only if the statement was made "without a reasonable basis or was disclosed other than in good faith." *Id.* § 230.175(a). The rule does not purport to define what is or is not materially misleading.

Again, nothing in Rule 175 is inconsistent with the principle that the materiality of forward-looking statements must be determined in light of the context in which they are made. If an offering document contains sufficient cautionary language, it simply has no need for the Rule 175 "safe harbor." In short, the Rule is silent on the matters at issue here, which explains why none of the courts of appeals that have applied the "bespeaks caution" doctrine have even cited Rule 175.[8]

The approach adopted by the court of appeals in fact complements, and is thus consistent with, the safe harbor provided by Rule 175. As one commentator noted in an article cited by Petitioners, the courts' application of Rule 175 and the "bespeaks caution" doctrine as safe harbors for forward-looking disclosures "brings the law in [this] area . . . more in-line with the framework established by the SEC." Suzanne J. Romajas, Note, *The Duty to Disclose Forward-Looking Information: A Look at the Future of MD&A*, 61 Fordham L. Rev. S245, S285 (1993).

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8 In any event, the courts below found that Petitioners had failed adequately to allege that the issuer either disbelieved or lacked a reasonable basis for belief in the predictions it made — the touchstones of actionability under Rule 175. *See* Pet. App. A54-55 n.17, A127-31.

Indeed, far from contravening SEC practice, the decisions by the courts below encourage, rather than stifle, full disclosure. As the district court recognized, its approach "is itself an endorsement of that fundamental concept of the securities laws, the touchstone of which is disclosure." Pet. App. A114. A contrary ruling, rather than encouraging full disclosure, would render full disclosure futile. In sum, in addition to the fact that they are not properly before this Court, Petitioners' arguments based on "SEC practice" are misguided and provide no basis for granting their petition.

III.

PETITIONERS' ARGUMENTS BASED ON THE LAVENTHOL REPORT PROVIDE NO BASIS FOR REVIEW BY THIS COURT.

Unable to mount any serious challenge to the court of appeals' analysis of the materiality of the allegations of their amended complaint, Petitioners seek to redeem that complaint with arguments based on unpleaded assertions concerning the Laventhol Report. But those arguments, too, are not properly raised before this Court, and in any event add nothing to Petitioners' claims.

Here, the court of appeals expressly declined to pass upon Petitioners' arguments predicated on the Laventhol Report because Petitioners failed to preserve properly those arguments for appeal. Indeed, Petitioners expressly disclaimed the need for the court of appeals to consider the substance of the Laventhol Report or the omission of any mention of the report in the prospectus. Accordingly, in arguing here that the prospectus "failed even to mention the existence of the Laventhol Report or describe its conclusions" (Pet. 10),

Petitioners raise an argument neither pressed nor passed upon below.

Moreover, the Laventhol Report adds nothing to the substance of the allegations of the amended complaint. The report was prepared for a third party — a different company — and for entirely different, internal planning purposes. As the district court aptly stated: "Management is not required by the securities fraud laws to disclose other companies' papers. Compliance with the disclosure requirements, if such a burden were imposed, would border on the impossible." Pet. App. A176. On its face the report was outdated, and it was "neither prepared for use in a prospectus, nor authorized for reference in a prospectus, nor commissioned by defendants, nor even commissioned by Resorts with the sale to Trump in mind." Pet. App. A177-79. In short, as the district court found, the Laventhol Report is meaningless, and Petitioners' reliance upon it amounts to an allegation of "fraud by hindsight." Pet. App. A179.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

STUART J. BASKIN
STEPHEN J. MARZEN
F. RUSSELL DUPUY
Shearman & Sterling
One Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 848-4000

Attorneys for Respondent Merrill Lynch, Pierce, Fenner & Smith, Inc.

RICHARD L. POSEN
Counsel of Record
JOHN R. OLLER
GEORGE VUOSO
MICHAEL P. COLLINS
Willkie Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 821-8000

JOHN J. BARRY
Clapp & Eisenberg, P.C.
One Newark Center
Newark, New Jersey 07102
(201) 642-3900

Attorneys for Respondents Donald J. Trump, Robert S. Trump, Harvey S. Freeman, The Trump Organization, Inc., Trump Taj Mahal Funding, Inc., Trump Taj Mahal, Inc., Trump Taj Mahal Associates Limited Partnership

Dated: February 11, 1994